TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 562

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HARRY J. MADIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1936

CERTIORARI GRANTED JANUARY 11, 1937

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[Names and addresses of attorneys omitted in printing.]

[Citation in usual form showing service on David Spaulding filed Oct. 4, 1935, omitted in printing.]

In United States District Court in and for the Southern District of California, Central Division

No. 5920-H

HARRY J. MADIGAN, plaintiff

vs.

UNITED STATES OF AMERICA, defendant

Complaint

Filed Sept. 21, 1932

Comes now the plaintiff and for his first cause of action against the defendant alleges as follows, to-wit:

I

That the plaintiff is a resident of Monrovia, County of Los Angeles, State of California. That he enlisted for military service in the United States Army on the 15th day of May, 1917, and was honorably discharged on the 25th day of July, 1919.

II

That while in the military service of the United States dur-
4 ing the war time period, desiring to be insured against the risks of war, said Harry J. Madigan applied for a policy of war risk insurance in the sum of Ten Thousand Dollars ($10,000.00). That a certificate of war risk insurance was duly issued to him by the terms whereof the defendant agreed to pay said plaintiff, or his estate, the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month in the event he suffered permanent and total disability to such an extent that he would be unable to follow continuously any substantially gainful occupation.

III

That while the said insurance policy was in force and effect the said plaintiff contracted the following disability, to-wit: pulmonary tuberculosis.

IV

That by reason of the foregoing the plaintiff was discharged, as aforesaid, totally and permanently disabled from pumonary tubercu-

losis; and plaintiff has been informed and believes, and therefore alleges as true, that he will always be so disabled and never again be able to follow any substantially gainful occupation, by reason whereof he became entitled to receive from the defendant the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month commencing on th 25th day of July, 1919.

V

That the plaintiff has made due proof of said total and permanent disabilities to the said defendant and demanded payments of the aforesaid amounts, but the defendant disagreed with plaintiff as to his claim of disability and has wholly failed to pay to the
5 plaintiff the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month or any part thereof. That at this time the plaintiff is totally and permanently disabled and has been since the date of said discharge.

Wherefore, the plaintiff demands judgment against the defendant in the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month from the 25th day of July 1919.

Comes now the plaintiff and for his second cause of action against the defendant alleges as follows, to-wit:

I

Plaintiff includes paragraph one of his first cause of action as if it were here specifically set out.

II

Plaintiff includes paragraph two of his first cause of action as if it were here specifically set out.

III

Plaintiff includes paragraph three of his first cause of action as if it were here specifically set out.

IV

That at the time of plaintiff's discharge from service he ceased paying premiums on said policy of insurance. That at the time of plaintiff's discharge from said service plaintiff was suffering from a compensable disability. That a rating for compensation from the date of plaintiff's discharge was given plaintiff by representatives of the defendant on the 29th day of October 1921. That if plaintiff was not totally and permanently disabled on the date of his said discharge from service, then the plaintiff was totally
6 and permanently disabled from the 29th day of October 1921. That on the 29th day of October 1921, plaintiff was entitled

to due and uncollected compensation and that by reason of said due and uncollected compensation plaintiff's insurance was in full force and effect on the 29th day of October 1921. That the plaintiff became entitled to receive from the defendant the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month commencing on the 29th day of October 1921, less the unpaid premiums and interest thereon at five per cent per annum, compounded annually, from the date of plaintiff's discharge to the 29th day of October 1921.

V

That plaintiff has made due proof of said total and permanent disability to the said defendant and demanded payment of the aforesaid amounts, but the defendant disagreed with plaintiff as to his claim of disability and has failed to pay to the plaintiff the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month from the 29th day of October 1921. That the plaintiff is totally and permanently disabled and has been since the 29th day of October 1921.

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month from the 29th day of October 1921, less the amount of unpaid premiums and interest thereon at the rate of five per cent per annum, compounded annually, from the date of plaintiff's discharge to the 29th day of October 1921.

David Spaulding,
DAVID SPAULDING,
Attorney for Plaintiff.

7 [*Duly sworn to by Harry J. Madigan, jurat omitted in printing.*]

In United States District Court

No. 5920–H

Affidavit of service

Filed Sept. 27, 1932

STATE OF CALIFORNIA,
County of Los Angeles, ss:

David Spaulding, being first duly sworn, upon his oath deposes and says:

That he is attorney of record for plaintiff in the above en-
8 titled action; that on the 22nd day of September 1932, the affiant mailed a true copy of the complaint in the above entitled action to the Attorney General at Washington, D. C., by registered mail, and that on the 21st day of September 1932, affiant

served two copies of the said complaint upon Samuel W. McNabb, District Attorney for the Southern District of California, Central Division.

David Spaulding,
DAVID SPAULDING.

Subscribed and sworn to before me this 26th day of September 1932.

[SEAL] IDA M. GIFFORD,
Notary Public in and for the said County and State.

My commission expires June 27, 1936.

[File endorsement omitted.]

In United States District Court

No. 5920–H

Answer

Filed Nov. 18, 1932

Comes now the Defendant, United States of America, by Samuel W. McNabb, United States Attoreny for the Southern District of California, and answering Plaintiff's Complaint herein, admits, denies, and alleges:

I

The Defendant has no information or belief sufficient to
9 enable it to answer the allegations of both causes of action of said Complaint and, placing its denial on that ground, denies each and every allegation therein contained.

Wherefore, the Defendant prays that the Plaintiff take nothing by this action, and that judgment be entered for the Defendant with its costs.

SAMUEL W. MCNABB,
United States Attorney,
Ignatius F. Parker,
IGNATIUS PARKER,
Assistant United States Attorney,
H. C. VEIT,
Veterans Administration Attorney,
Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 5920–H

Agreed statement of facts and plaintiff's request for conclusions of law

Filed June 25, 1935

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the respective parties hereto, through counsel, that for the purpose of the above entitled action, the following facts shall be taken as true and correct:

I

That the plaintiff enlisted in the military service on the 15th day of July 1917 and was honorably discharged on the 25th day of July 1919; that while in said service plaintiff applied for and was granted $10,000.00 war risk term insurance, upon which premiums were paid to November 1, 1919.

II

That on November 1, 1919, plaintiff converted his $10,000.00 war risk term insurance contract into a 20-payment life policy of United States Government insurance, upon which premiums were paid so as to keep it in force until January 31, 1920; that on November 1, 1919, plaintiff was suffering from a compensable disability; that on January 31, 1920, plaintiff was suffering from a compensable disability.

III

That on June 6, 1925, the Veterans' Bureau rated plaintiff permanently and totally disabled, and on that date there was compensation due and unpaid plaintiff in the amount of $312.25. That a claim was filed by Plaintiff on Jan. 15, 1931—That said claimed was denied July 15, 1932.

David Spaulding,
DAVID SPAULDING,
Attorney for plaintiff,
Ernest D. Fooks,
ERNEST D. FOOKS,
Attorney,
Department of Justice.

CONCLUSIONS OF LAW

(See requested conclusions of law incorporated in Bill of Exceptions.)

[File endorsement omitted.]

11 In United States District Court

No. 5920–H

Findings of fact and conclusions of law

Filed July 10, 1935

This matter coming on regularly to be heard before the undersigned, one of the Judges of the above entitled Court, plaintiff appearing by his counsel, David Spaulding, and defendant appearing by Pierson N. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, from the evidence submitted, the following Findings of Fact are made:

I

That at the time of the commencement of this action, plaintiff, Harry J. Madigan, was and still is, a citizen of the United States and a resident of the County of Los Angeles, State of California.

II

That the plaintiff enlisted for military service in the United States Army on the 15th day of May, 1917, and was discharged therefrom on the 25th day of July, 1919.

III

That plaintiff, Harry J. Madigan, on February 5, 1918, applied for, and was granted, a contract of war risk term insurance in the amount of $10,000.00, and paid premiums thereon so as to keep it in force until November 1, 1919.

12 IV

That on November 1, 1919, plaintiff Harry J. Madigan was suffering from a compensable disability; that on June 6, 1925, plaintiff had due and uncollected compensation in the amount of $312.25; that on June 6, 1925, plaintiff became permanently and totally disabled.

V

That defendant, United States of America, has disagreed with plaintiff as to his claim for benefits under the war risk insurance contract.

VI

That the defendant is entitled to a credit for any monies heretofore paid plaintiff as insurance benefits subsequent to November 1, 1919; that the plaintiff is entitled to recover any monies paid as insurance premiums subsequent to November 1, 1919.

CONCLUSIONS OF LAW

From the above Findings of Fact, the Court makes the following Conclusions of Law:

I

That plaintiff became permanently and totally disabled on June 6, 1925.

II

That plaintiff is entitled to benefits under his $10,000.00 term contract of insurance in the amount that $312.25 would purchase were it applied as premiums when due between November 1, 1919, and June 6, 1925, said premiums computed at the rate provided by Section 302 of the War Risk Insurance Act as amended December
13 24, 1919, less said unpaid premiums and interest thereon, at five per cent per annum, compounded annually.

Dated: This 10 day of July, 1935.

HOLLZER,
United States District Judge.

Approved as to form, as provided in Rule 44.

ERNEST D. FOOKS,
For Assistant U. S. Attorney.

[File endorsement omitted.]

In United States District Court in and for the Southern District of California, Central Division

HARRY J. MADIGAN, *plaintiff*

vs.

UNITED STATES OF AMERICA, *defendant*

No. 5920–H

Judgment

Filed July 10, 1935

The above entitled cause came on duly to be heard before the Honorable Harry A. Hollzer, one of the Judges of the above entitled Court, plaintiff appearing by his attorney, David Spaulding,
14 and defendant, United States appearing by Pierson N. Hall, United States Attorney and Ernest D. Fooks, Attorney Department of Justice; a jury having been duly waived and the evidence submitted to the Court upon an agreed statement of facts, and the Court having duly considered the evidence submitted by both

parties, and having rendered an opinion in favor of the plaintiff to the effect that Harry J. Madigan became permanently and totally disabled on June 6, 1925; that on June 6. 1925, Harry J. Madigan had due and uncollected compensation from the defendant, in the amount of $312.25; that on November 1, 1919, the last date plaintiff paid premiums on his $10,000.00 term policy of insurance, plaintiff Harry J. Madigan was suffering from a compensable disability, and in consequence thereof, Harry J. Madigan or his estate, became entitled to receive from defendant under his $10,000.00 term policy of insurance, the amount of insurance that $312.25 would purchase applied as premiums when due on his $10,000.00 term insurance policy, between November 1, 1919, and June 6, 1925, said premium computed at the rate provided by Section 302 of the War Risk Insurance Act as Amended December 24, 1919, less the unpaid premiums and interest thereon at five per cent per annum compounded annually.

Now therefore, it is ordered, adjudged, and decreed that the plaintiff recover from the defendant, benefits in accordance with the terms of the said $10,000.00 war risk term insurance contract, commencing June 6, 1925, in the amount that $312.25 would purchase if applied as premiums when due between November 1, 1919 and June 6, 1925, said premiums computed at the rate provided by Section 302 of the War Risk Insurance Act as amended December 24, 1919, less the unpaid premiums and interest thereon, at five per cent per annum, compounded annually, and as provided in Section 305 of the World War Veterans' Act (Section 518 Title 28, U. S. C. A.).

It is further ordered, adjudged, and decreed that any and all contracts of insurance entered into between plaintiff and defendant other than his $10,000.00 term contract of insurance, be, and the same are, hereby cancelled and set aside, and that the plaintiff recover from defendant all money paid subsequent to November 1, 1919, as premiums on insurance; that the defendant is entitled to a credit herein for any monies heretofore paid plaintiff by defendant as insurance benefits.

It is further ordered that David Spaulding is entitled to receive from said Judgment as a reasonable attorney fee for his services as attorney in the above entitled cause, ten per cent of the amount of any and all monies due plaintiff in accordance herewith, and that he is entitled to receive a further sum of ten per cent of each and every payment other than the said sum found to be due hereunder, hereinafter made by the defendant to the plaintiff, his heirs, executors, and assigns, in consequence of, or as the result of the entry of this Judgment, said payments, however, to be made as by law in such cases provided.

Done in open court this 10 day of July 1935.

HOLLZER,
United States District Judge.

Approved as to form, as provided in Rule 44.

ERNEST D. FOOKS,
For Assistant U. S. Attorney.

7-829.

Judgment entered and recorded July 10th, 1935. R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy Clerk.

[File endorsement omitted.]

In United States District Court

No. 5920-H

Bill of exceptions

Filed Nov. 14, 1935

Be it remembered that heretofore, to-wit, on the 23rd day of October 1934, the above-entitled cause came on for trial at the City of Los Angeles, in said District, upon the issues joined herein, before the Honorable Harry A. Hollzer, sitting as a Judge of said Court, and was thereafter continued for hearing and argued on the 25th day of June 1935, upon an Agreed Statement of Facts heretofore filed.

Plaintiff was represented by David Spaulding, Esq., and
17 the defendant was represented by Peirson M. Hall, Esq., United States Attorney for the Southern District of California, and Ernest D. Fooks, Esq., Attorney, Department of Justice, of said district.

The Court, sitting without a jury, considered the evidence as shown by the Agreed Statement of Facts and made its conclusions of law in favor of the plaintiff thereon.

Whereupon, the defendant moved for special findings and submitted to the Court its Requested Findings of Fact and Conclusions of Law, which are as follows:

[Title omitted.]

Requested findings of fact and conclusions of law

Now comes Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, Attorneys for defendant in the above-entitled cause, and requests the Court to make the following findings of fact and and conclusions of law:

18 FINDINGS OF FACT

I

The Court finds that plaintiff on February 5, 1918, applied for and was granted a contract of war risk term insurance in the amount

of $10,000.00, and paid premiums thereon so as to keep it in force until November 1, 1919.

II

The Court finds that on November 1, 1919, plaintiff converted his $10,000.00 war risk term insurance contract into a 20-payment life policy of the United States Government Insurance and paid premiums thereon so as to keep it in force, including grace period, until January 31, 1920.

III

The Court finds that on January 31, 1920, plaintiff was suffering from a compensable disability.

IV

The Court finds that on June 6, 1925, the Veterans' Bureau rated plaintiff permanently and totally disabled; and at that time there was compensation due and unpaid plaintiff.

CONCLUSIONS OF LAW

I

The Court finds that there was no lapsation, cancellation, or reduction of the $10,000.00 war risk term insurance contract.

II

The Court finds that by virtue of Section 305 (Section 516,
19 Title 38, U. S. C. A.) plaintiff's $10,000.00 converted contract of insurance was revivable in the amount of $2,170.92.

III

The Court finds that plaintiff is not entitled to Judgment as prayed for herein.

IV

The Court finds that the defendant is entitled to Judgment and for its costs incurred herein.

Respectfully submitted.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney,
Ernest D. Fooks,
ERNEST D. FOOKS,
Attorney,
Department of Justice.

Dated: June 24, 1935.

Whereupon, plaintiff requested the Court to make certain conclusions of law, which are as follows:

Requested conclusions of law

From the above agreed statement of facts, the Court makes the following conclusions of law:

I

That by virtue of Section 307 of the World War Veterans Act as amended by the Act of July 3, 1930 (38 U. S. C. A. 518) plaintiff has the right to elect to recover under either his term policy from November 1, 1919, or under his converted policy from January 31, 1920.

II

That by virtue of Section 305 (38 U. S. C. A. 516) plaintiff
20 is entitled to recover the amount of insurance that $312.25 computed at the rate provided in Section 302 of the War Risk Insurance Act as Amended December 24, 1919, would purchase if applied as premiums when due.

Dated: June 24, 1935.

Respectfully submitted.

David Spaulding,
DAVID SPAULDING,
Attorney for plaintiff.

Motion for judgment

Whereupon the defendant moved for judgment on the grounds that under the pleadings, the Agreed Statement of Facts, and the law of the case, the plaintiff was not entitled to recover.

The Court thereupon overruled said motion, to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And thereupon, on the 10th day of July 1935, the Court made and filed its Findings of Fact and Conclusions of Law and judgment in said cause (reference is hereby made to said Findings of Fact and Conclusions of Law and judgment as shown by the record herein), to which said Conclusions of Law of the Court the defendant at the time duly excepted and still excepts.

And thereupon on the 11th day of July 1935, upon the application of the defendant and for good cause shown, the following order was entered:

Order extending time within which to serve and file bill of exceptions and extending term

On motion of Peirson M. Hall, United States Attorney for
21 the Southern District of California, and Ernest D. Fooks,

Attorney Department of Justice, and good cause appearing therefor:

It is ordered that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including October 10, 1935.

It is further ordered that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including October 10, 1935.

Dated: July 11, 1935.

HOLLZER,
United States District Judge.

And thereafter, and on the 3rd day of October 1935, upon the application of the defendant, and for good cause shown, the following order was entered:

Order extending time within which to serve and file bill of exceptions and extending term

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, Ernest R. Utley, Assistant United States Attorney, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

It is ordered that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including January 10, 1936.

22 It is further ordered that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including January 10, 1936.

Dated: October 3, 1935.

HOLLZER,
United States District Judge.

And now, in furtherance of justice, and that right may be done, the defendant, the United States of America, presents the foregoing as and for its Bill of Exceptions in the above-entitled cause, and prays that the same may be settled, allowed, signed, and filed as such.

Pierson M. Hall,
PIERSON M. HALL,
United States Attorney,
Ernest D. Fooks,
ERNEST D. FOOKS,
Attorney,
Department of Justice.

Acknowledgment of service

The undersigned, David Spaulding, Esq., for and on behalf of Harry J. Madigan, plaintiff in the above-entitled cause, does hereby acknowledge service of the above and foregoing bill of exceptions this 14 day of November 1935, and having examined the same does agree that the same contains all the evidence given, and proceedings had on the trial of this action, and that it is full, true and correct in all respects, and that the same may be allowed, settled, signed, and filed and made a part of the record in said cause, and does
23 hereby waive the right to be present at the settlement and allowance of said bill of exceptions.

David Spaulding,
DAVID SPAULDING,
Attorney for Plaintiff.

Order settling bill of exceptions

And thereupon, and on the 14th day of November, 1935, upon due notice to the said Harry J. Madigan, plaintiff, and within the time limited and granted by the Court therefor, the foregoing bill of exceptions is duly tendered by the United States of America, defendant, for signing, settlement, and allowance as the bill of exceptions in said cause, and the said defendant and plaintiff having agreed that the same contains all the evidence given, and proceedings had on the trial of this action, and that it is full, true, and correct in all respects;

It is ordered that the above and foregoing be and the same is hereby duly settled, certified and allowed as the bill of exceptions in said cause, and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 14 day of November, A. D. 1935.

HOLLZER,
United States District Judge,
Trial Judge in said Cause.

[File endorsement omitted.]

In United States District Court

24 [Title omitted.]

No. 5920-H

Petition for appeal

Filed Oct. 3, 1935

To the Honorable HARRY H. HOLLZER, JUDGE OF THE ABOVE-ENTITLED COURT:

Now comes the Defendant, United States of America, by Peirson M. Hall, United States Attorney for the Southern District of Cali-

fornia, Ernest R. Utley, Assistant United States Attorney for said District, and Ernest D. Fooks, Attorney, Department of Justice, and feeling itself aggrieved by the judgment entered in this cause, hereby prays that an appeal may be allowed, to-wit: from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and in this connection this Petitioner, with this Petition, hereby presents its Assignments of Error.

Dated: October 3, 1935.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney.

25

Ernest R. Utley,
ERNEST R. UTLEY,
Assistant United States Attorney.

Ernest D. Fooks,
ERNEST D. FOOKS,
Attorney, Department of Justice.

[File endorsement omitted.]

In United States District Court

No. 5920–H

Assignments of error

Filed Oct. 3, 1935

Comes now the Defendant, the United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, Ernest R. Utley, Assistant United States Attorney for said District, and Ernest D. Fooks, Attorney, Department of Justice, and for its Assignments of Error, alleges as follows:

I

That the Court erred in denying defendant's requested finding that there was no lapsation, cancellation, or reduction of the $10,000.00 war risk term insurance contract on November 1, 1919.

II

That the Court erred in finding that plaintiff was entitled to benefits under his $10,000.00 contract of term insurance in the

26 amount that $312.25 would purchase were it applied as premiums when due between November 1, 1919, and June 6, 1925, said premiums computed at the rate provided by Section 302 of the War Risk Insurance Act as amended December 24, 1919, less unpaid premiums and interest thereon, at five per cent per annum, compounded annually.

III

That the Court erred in finding that plaintiff is entitled to recover any monies paid as insurance premiums subsequent to November 1, 1919.

IV

That the Court erred in denying defendant's requested finding that by virtue of Section 305 (Section 516, Title 28, U. S. C. A.) plaintiff's $10,000.00 converted contract of insurance was revivable in the amount of $2,170.92.

V

That the Court erred in finding that plaintiff had the right to elect to recover insurance benefits under either his term policy from November 1, 1919, or under his converted policy from January 1, 1920, by virtue of Section 307 of the World War Veterans Act as amended by the Act of July 3, 1930 (38 U. S. C. A. 518).

VI

That the Court erred in denying defendant's motion to dismiss plaintiff's cause of action and granting defendant judgment with its costs incurred.

Dated: October 3, 1935.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney,
Ernest R. Utley,
27 ERNEST R. UTLEY,
Assistant United States Attorney,
Ernest D. Fooks,
ERNEST D. FOOKS,
Attorney, Department of Justice,
Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 5920-H

Order allowing appeal

Filed Oct. 3, 1935

It is hereby ordered that the appeal prayed for in the Petition for Appeal in the above-entitled cause be allowed.

Dated: October 3, 1935.

HOLLZER,
United States District Judge.

[File endorsement omitted.]

In United States District Court

No. 5920–H

Praecipe for record

Filed Nov. 14, 1935

To the CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare a Transcript on Appeal herein including the following portions of the record, to-wit:

1. Citation.
2. Complaint.
28 3. Affidavit of Service of Complaint.
4. Answer.
5. Agreed Statement of Facts.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Bill of Exceptions.
9. Petition for Appeal.
10. Order Allowing Appeal.
11. Assignments of Error.
12. This Praecipe.

PEIRSON M. HALL,
United States Attorney,
ERNEST D. FOOKS,
Attorney, Department of Justice,
Attorneys for Defendant and Appellant.

Due service is acknowledged of the fore-going Praecipe, and it is stipulated that the contents thereof may constitute the record on Appeal.

Dated this 14th day of November 1935.

David Spaulding,
DAVID SPAULDING,
Attorney for Plaintiff and Appellee.

[Clerk's Certificate to foregoing transcript omitted in printing.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

vs.

HARRY J. MADIGAN, APPELLEE

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from proceedings of Wednesday, April 8, 1936

Before WILBUR, GARRECHT, and HANEY, Circuit Judges

Order of submission

Ordered above cause argued by Mr. Randolph C. Shaw, Special Assistant to the Attorney General, counsel for appellant, and by Mr. David Spaulding, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from proceedings of Tuesday, September 8, 1936

Before DENMAN and MATHEWS, Circuit Judges

Order directing filing of opinion and the filing and recording of judgment

By direction of the court, ordered that the typewritten opinion this day rendered by this court in the above cause be forthwith filed by the clerk and that a judgment be filed in said cause and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8038

UNITED STATES OF AMERICA, APPELLANT

vs.

HARRY J. MADIGAN, APPELLEE

September 8, 1936

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Before WILBUR, GARRECHT, and HANEY, Circuit Judges

GARRECHT, Circuit Judge: Harry J. Madigan entered the Military Service of the United States July 15, 1917, and, after service, was honorably discharged on July 25, 1919. While in such military service he applied for and was granted $10,000 war risk insurance, upon which premiums were paid to November 1, 1919. On this latter date Madigan converted his $10,000 war risk term insurance contract into a 20-payment life policy of United States Government insurance, upon which premiums were paid to keep it in force until January 31, 1920.

On November 1, 1919, and also on January 31, 1920, appellee was suffering from a compensable disability. On June 6, 1920, the Veteran's Bureau rated him totally and permanently disabled, and on said date there was due him as compensation the sum of $312.25.

The case was tried to the court without jury on an agreed statement of facts and judgment entered for plaintiff, from which the government appeals.

The statute under which the action was brought (Section 305 of the World War Veterans' Act; 43 Stat. 626, amended 44 Stat. 799, 45 Stat. 971, 46 Stat. 1016; 38 U. S. C. A., §516 (Quoted), is as follows:

"Where any person has, prior to June 7, 1924, allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected, and dies or has died, or becomes or has become permanently and totally disabled, and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act, as amended December 24, 1919, chapter 16, Forty-first Statutes, page 371, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the Veterans' Administration is hereby authorized and directed to pay said soldier or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum, compounded annually, in installments as provided by law: Provided,

That insurance revived after June 7, 1924, under this section and section 516 b of this title by reason of permanent and total disability or by death of the insured, shall be paid only to the insured, his widow, child or children, dependent mother or father, and in the order named, unless otherwise designated by the insured during his lifetime or by last will and testament: Provided Further, That compensation which is uncollectible by reason of the provisions of section 310 of the War Risk Insurance Act, as amended, or section 499 of this title, shall be considered as uncollected compensation for the purposes of this section."

And Section 307 of the World War Veterans' Act (43 Stat. 627; amended, 46 Stat. 1001, 46 Stat. 1016; 38 U. S. C. A., §518 (quoted), is as follows:

"All contracts of policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 447 of this title: Provided, That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the Veterans' Administration or to bring suit under section 445 of this title on any prior contract or policy, and if found entitled thereto shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: Provided further, That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance."

The Government, while conceding that all the conditions existed for revival of the insurance in the converted form and that plaintiff is entitled to benefits on that basis, contends that the insurance in the original form had not been allowed to lapse nor been canceled or reduced within the meaning of Section 305, and that hence it failed to meet one of the conditions essential to revival in that form. The Government contends that the uncollected compensation due on the date of total permanent disability must be applied as premiums on the twenty payment life insurance policy. On the other hand, the appellee asserts that he has a right to make claim and bring suit on any prior contract or policy, and if found entitled thereto, upon surrender of the subsequent policy, he shall be entitled to payments under the prior contract.

"It is manifest that under section 305 a veteran who has become totally and permanently disabled is entitled to payment under his war risk insurance if he has failed to collect compensation due him sufficient to pay the premium thereon" Berntsen v. U. S., 41 F. (2d) 663, 665 (C. C. A. 9).

The Circuit Court of Appeals for the Fifth Circuit said of Section 305 in U. S. v. Sellers, 75 F. (2d) 623, 625:

"This is not a provision for reinstatement, but a declaration that under the named circumstances the policy is not to be considered as

ever having lapsed, followed by a direction for its payment as a matured claim. The supposed lapse must have happened at a time when compensation was really due the soldier, and the death or total permanent disability which matures the policy must have occurred while the compensation remained uncollected. The thought is that the policy should not be held to have lapsed while the United States were owing the soldier enough to have paid his premiums, and that it should now be paid even though the compensation was collected after the maturity of the policy, the unpaid premiums being taken out of the insurance money."

Again, in U. S. v. Hendricksen, 53 F. (2d) 797, 799 (C. C. A. 10), it is said:

"A war risk insurance policy does not lapse for nonpayment of premiums, as long as the government fails to pay the soldier installments of compensation to which he is entitled under the ratings of the bureau. Nor is the purpose of the statute obscure; if the government had paid the compensation as and when due, the soldier would have been able to have paid his premiums. The statute provides that the unpaid premium shall be deducted from his insurance, and not from his compensation."

The above cases are authority to the effect that one or the other of the policies is valid and that the veteran may collect under one of them. In fact, the Government concedes the validity of the twenty payment life policy but argues that the insured had no right to elect under which policy he would demand payment. Presumably the original policy from the standpoint of premiums was the cheaper and, therefore, the application of the unpaid compensation to premiums thereon would be of greater benefit to the veteran.

We think the decision of this Court, in U. S. v. Arzner, 57 F. (2d) 488, 489, is decisive:

"The purpose of the amendment [to section 307] was to meet the situation that had arisen by reason of numerous holdings of the courts to the effect that the subsequent veterans' insurance policies were novations, and that, thereafter, recovery could not be had upon the original insurance and that ordinary principles of contract applied to the veterans' policies. * * * The obvious purpose of the amendment was to permit the veteran to present to a court and jury his claim that he was totally and permanently disabled during the life of his war risk insurance policy and to provide that if his contention was sustained by the court and jury he should recover under the terms of the original contract notwithstanding the fact that in the subsequent dealings with the Veterans' Bureau he had accepted some form of insurance in lieu of the original war risk insurance. By this legislation he was not required to jeopardize his rights under the subsequent contracts or policies in order to present his claim under the superseded war risk insurance. He could completely ignore the subsequent policies. They constituted no defense. If the judgment was in his favor in his suit on the original policy, however, he was

required to surrender any subsequent contract or policy before he was entitled to payment under the prior contract or policy."

The above-quoted case sets at rest the contentions of the government and is determinative of this appeal. There is no especial merit in the fact that Section 305 does not contain the word "converted", for that word is contained in Section 307.

In view of the fact that the original policy of insurance is held to have been in force and not lapsed, the appellee is entitled to a refund or credit for the premiums paid on the twenty payment life policy. The subsequent policy not being additional insurance, but a conversion of the original, which is held not lapsed, the insured actually received nothing for the premiums paid thereon and is entitled to credit therefore.

Judgment affirmed.

(Endorsed:) Opinion. Filed Sep. 8, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8038

UNITED STATES OF AMERICA, APPELLANT

vs.

HARRY J. MADIGAN, APPELLEE

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is, affirmed.

(Endorsed:) Judgment. Filed and entered September 8, 1936. Paul P. O'Brien, Clerk.

I, Paul P. O'Brien, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-nine (39) pages, numbered from and including 1 to and including 39, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Honorable J. Stanley Reed, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of December, A. D. 1936.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1936

41 Supreme Court of the United States

Order allowing certiorari

Filed January 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 41, 102. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 562. The United States of America, petitioner, vs. Harry J. Madigan. Petition for a writ of certiorari and exhibit thereto. Filed December 8, 1936. Term No. 562, O. T. 1936.